OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 19125595) CDTFA Case No. 051-078
G. JIMENEZ	)
dba EL UNICO	)
	)

OPINION

Representing the Parties:

For Appellant:	G. Jimenez, Owner
For Respondent:	Jason Parker, Chief of Headquarters Operations
For Office of Tax Appeals	Lisa Burke, Business Taxes Specialist III

N. RALSTON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, G. Jimenez dba El Unico (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA)[1] denying appellant's petition for redetermination of a Notice of Determination (NOD) issued on February 24, 2017. The NOD is for $18,606.48 in tax, plus applicable interest, for the period October 1, 2013, through September 30, 2016 (audit period).

Appellant waived her right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUES

1. Whether appellant has established that a reduction to the amount of unreported taxable sales is warranted.
2. Whether appellant has established that an increase to the deduction for unclaimed tax-paid purchases resold prior to use is warranted.

[1] Sales taxes were formerly administered by the Board of Equalization (board). Effective July 1, 2017, functions of the board relevant to this case were transferred to CDTFA. (Gov. Code, § 15570.22.) When referring to acts or events that occurred before July 1, 2017, "CDTFA" shall refer to its predecessor, the board.

3. Whether appellant has established that additional relief of interest is warranted.

FACTUAL FINDINGS

1. Appellant has operated a restaurant selling Mexican-style food and non-alcoholic beverages for consumption on the premises or to-go since April 1, 2007. Appellant has no indoor seating but has 14 tables with a seating capacity of approximately 45 customers in an outdoor covered patio. Appellant is open daily from 9:00 a.m. to 7:00 p.m., subject to weather conditions.
2. Appellant was previously audited for the period of July 1, 2009 through December 31, 2012. Appellant used audited average daily sales calculated by CDTFA during that prior audit to report taxable sales during the current audit period.
3. For the current audit period, appellant reported total sales of $227,049 and claimed no deductions.
4. For audit, appellant provided her federal income tax returns (FITRs) for 2013 and 2014; sales and use tax returns for the audit period; merchandise purchase invoices for the fourth quarter of 2016 (4Q16); and sales receipts for five days: December 29, 2016; December 30, 2016; and January 2, 2017, through January 4, 2017. CDTFA also obtained appellant's Form 1099-K merchant card sales data for 2013, 2014, and 2015.[2]
5. CDTFA found that the gross receipts reported on appellant's FITRs exceeded the total sales reported on her sales and use tax returns by $25,377 for 2013 and by $23,215 for 2014.
6. Based on merchandise purchases of $6,812 shown in the merchandise purchase invoices for November 2016, CDTFA estimated merchandise purchases of $81,720 per year. The estimated merchandise purchases exceeded appellant's reported taxable sales of $59,169 for 2014 and were nearly the same as reported taxable sales of $82,298 for 2015.
7. CDTFA decided to prepare a credit card sales ratio analysis to establish audited taxable sales. CDTFA began by observing appellant's operations on Tuesday, December 27, 2016, and on Wednesday, December 28, 2016. CDTFA combined the results of its observation tests with the sales shown in the five days of sales receipts

[2] Form 1099-K is an Internal Revenue Service form titled "Payment Card and Third-Party Network Transactions." Form 1099-K reports the monthly and annual amount paid to the merchant in a calendar year by customers using some type of payment card or third-party network, if the amount paid to the merchant exceeds $20,000 in that calendar year.

provided by appellant, and computed total sales of $4,118.63, with total sales paid by credit card of $2,442.48, which represented an average credit-card-to-total-sales ratio (creditcard sales ratio) of 59.30 percent ($2,442.48 ÷ $4,118.63).

8. CDTFA used the 1099-K credit card sales data to compile credit card sales for each quarter. However, because the credit card sales total for 2Q14 was substantially lower than the credit card sales totals for every other quarter in the examination, CDTFA concluded that the credit card sales information for 2Q14 was incomplete. CDTFA excluded 2Q14 from its analysis, and compiled credit card sales totaling $179,185 for the remaining quarters in the period October 1, 2013, through December 31, 2015.

9. CDTFA divided credit card sales for each quarter by the audited credit-card-sales ratio of 59.30 percent to calculate audited total (and taxable) sales of $302,167 for the period October 1, 2013, through December 31, 2015 (excluding 2Q14). A comparison of audited taxable sales of $302,167 with appellant's reported taxable sales of $140,799 for the same quarters showed unreported taxable sales of $161,368.

10. A comparison of unreported taxable sales of $20,218 for 1Q14 with appellant's reported taxable sales of $11,956 for that quarter showed a reporting error rate of 169.10 percent. CDTFA applied the 169.10 percent error rate to appellant's reported taxable sales of $11,366 for 2Q14 to calculate unreported taxable sales of $19,220 for 2Q14.

11. For 1Q16 through 3Q16 CDTFA estimated appellant's unreported taxable sales. CDTFA compared appellant's unreported taxable sales for 3Q15 to appellant's reported taxable sales for that quarter and found an error rate of 90.15 percent. CDTFA then applied the error rate from 3Q15 to appellant's reported taxable sales of $74,885 for the period January 1, 2016, through September 30, 2016, to calculate unreported taxable sales of $67,508 for that period. Combined, CDTFA calculated unreported taxable sales of $248,096 ($161,368 + $19,220 + $67,508) for the audit period.

12. Subsequently, CDTFA found that credit card sales of $13,229 were missing from the data compiled for 2Q14. CDTFA computed that including credit card sales of $13,229 in its analysis would increase the reporting error rate for 2Q14 such that appellant's tax liability would increase by $497. Because correcting the error would be detrimental to appellant, CDTFA decided not to correct the error unless other adjustments were found to be warranted.

13. Based on its examination of appellant's merchandise purchase invoices for 4Q16, CDTFA concluded that appellant paid sales tax reimbursement to her suppliers on purchases of certain carbonated beverages. CDTFA used the merchandise purchase invoices for November 2016 to compute sales tax reimbursement of $34.49 added to purchases of carbonated beverages for resale totaling $431.13, which represented quarterly purchases of $1,293 ($431 x 3). For the audit period, CDTFA established a deduction of $15,516 ($1,293 x 12 quarters) for unclaimed tax-paid purchases resold prior to use.

14. The deficiency measure of $232,580 on which the NOD is based consists of $248,096 for unreported taxable sales reduced by $15,516 for unclaimed tax-paid purchases resold. In a Decision issued on November 5, 2019, CDTFA denied appellant's petition for redetermination. This appeal to Office of Tax Appeals (OTA) followed.

15. During this appeal, CDTFA now concedes that there was an unreasonable delay during the periods February 6, 2018, through May 31, 2018, and July 1, 2018, through September 24, 2018. CDTFA contends that, if appellant submits a written statement signed under penalty of perjury as required by R&TC section 6596, CDTFA would recommend relieving seven months of accrued interest.

DISCUSSION

Issue 1: Whether appellant has established that a reduction to the amount of unreported taxable sales is warranted.

California imposes sales tax on a retailer's gross receipts from the retail sale of tangible personal property in this state unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, §§ 6012, 6051.) For the purpose of the proper administration of the Sales and Use Tax Law and to prevent the evasion of the sales tax, the law presumes that all gross receipts are subject to tax until the contrary is established. (R&TC, § 6091.) It is the retailer's responsibility to maintain complete and accurate records to support reported amounts and to make them available for examination. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)1).)

When CDTFA is not satisfied with the amount of tax reported by the taxpayer, or in the case of a failure to file a return, CDTFA may determine the amount required to be paid on the

basis of any information which is in its possession or may come into its possession. (R&TC, §§ 6481, 6511.) In the case of an appeal, CDTFA has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Talavera*, 2020-OTA-022P.) Once CDTFA has met its initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from CDTFA's determination is warranted. (*Ibid*.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid*.)

Here, appellant failed to maintain records of her sales. Instead of using sales records for reporting purposes, appellant told CDTFA that she reported her sales based on the average daily sales that CDTFA calculated during her prior audit. CDTFA found that appellant's merchandise purchases exceeded her reported sales, which is strong evidence that appellant's reported sales were substantially understated. Given inadequate records and evidence of an understatement of reported taxable sales, we find that CDTFA was justified in using an analysis of the sales paid by credit card shown in Form 1099-K to establish audited taxable sales. We have reviewed the audit working papers, have found that the methods used were reasonable and rational, and have found no errors in the audit procedures or material inaccuracies in the calculations. Therefore, the burden of proof shifts to appellant to establish by documentation or other evidence that a reduction to the amount of unreported taxable sales is warranted.

Appellant has provided neither argument nor evidence supporting a reduction to the amount of unreported taxable sales. As stated above, CDTFA found that credit card sales of $13,229 were missing from its credit card sales ratio analysis, and computed that including those credit card sales would increase appellant's tax liability by $497. However, CDTFA does not recommend correcting the error unless an offsetting reduction to the liability is found to be warranted, and we concur. Therefore, in the absence of documentation or other evidence supporting a reduction to the amount of unreported taxable sales, we find that no adjustment is warranted.

Issue 2: Whether appellant has established that an increase to the deduction for unclaimed tax-paid purchases resold prior to use is warranted.

A retailer who resells tangible personal property before making any use thereof (other than retention, demonstration or display while holding it for sale in the regular course of business) may take a deduction of the purchase price of the property if, with respect to its

purchase, the retailer has reimbursed his or her vendor for the sales tax or has paid the use tax. (R&TC, § 6012(a)(1); Cal. Code Regs., tit. 18, § 1701(a).)

Based on an examination of appellant's merchandise purchase invoices for 4Q16, CDTFA found that appellant paid sales tax reimbursement to her vendors on her purchases of certain carbonated beverages for resale at the restaurant. Using merchandise purchase invoices for November 2016, CDTFA compiled sales tax reimbursement of $34.16 added to appellant's purchases of carbonated beverages totaling $431.13. CDTFA used monthly costs of tax-paid purchases resold of $431 to establish unclaimed costs of tax-paid purchases resold of $1,293 per quarter ($431 x 3) and $15,516 for the audit period ($431 x 36).

Appellant has raised no contentions on appeal, but only requests relief of interest. During her appeal with CDTFA's Appeals Bureau, appellant argued that the deduction of $15,516 for unclaimed costs of tax-paid purchases resold does not represent all of her tax-paid purchases of merchandise for resale during the audit period. In support, appellant provided 319 purchase invoices from 2Q14, 2Q15, and 2Q16. CDTFA examined the purchase invoices and compiled sales tax reimbursement added to costs of carbonated beverages of $31.16 for 2Q14, $56.63 for 2Q15, and $71.60 for 2Q16. Because appellant's evidence showed that the sales tax reimbursement added to her purchases of carbonated beverages for resale was less than sales tax reimbursement of $103.48 per quarter ($34.16 x 3) computed by CDTFA from its test of purchase invoices for November 2016, CDTFA found that the additional evidence provided on appeal does not benefit appellant, and it recommends no adjustment to the audited allowed deduction of $15,516 for unclaimed costs of tax-paid purchases resold.

Upon OTA's review of the summary of the additional purchase invoices provided by appellant, it appears appellant made tax-paid purchases of plastic cups, foam plates, napkins, hinge flats, and similar disposable items typically resold by restaurant owners together with their sales of food and drinks, and we asked CDTFA for additional briefing on this issue. Upon further examination, CDTFA now concedes that appellant's tax-paid purchases of plastic cups, foam plates, and similar items should have been included in the deduction for unclaimed tax-paid purchases resold. By including the tax paid on appellant's purchases of plastic cups and the other questioned items, CDTFA computed tax paid on purchases of merchandise for resale of $117.07 per quarter, which exceeded the tax paid on merchandise purchases for resale established in the audit by $13.60 per quarter. However, CDTFA contends that no adjustments

are warranted. CDTFA asserts that, if it performs a reaudit to increase the deduction for costs of tax-paid purchases resold, it will be required to correct the error in its credit card sales ratio analysis described above, which would result in an increase to the deficiency measure for unreported taxable sales. CDTFA points out that, overall, correcting both errors would result in an increase to appellant's tax liability.

We have verified the accuracy of CDTFA's computations and have concluded that correction of both of the errors would result in an increase of $333.80 to appellant's liability for tax. To avoid increasing appellant's tax liability on appeal, CDTFA has declined to perform a reaudit. As CDTFA has not asserted an increase to appellant's tax liability, this issue is not before OTA.

In the absence of additional documentation or other evidence to support an additional deduction for unclaimed costs of tax-paid purchases resold, we find that no adjustment is warranted.

Issue 3: Whether appellant has established that additional relief of interest is warranted.

There is no statutory right to interest relief. The law allows OTA,[3] in its discretion, to grant relief of all or any part of the interest imposed on a person under the sales and use tax law where the failure to pay the tax is due in whole or in part to an unreasonable error or delay by an employee of the board (or, after July 1, 2017, CDTFA) acting in his or her official capacity. (R&TC, §§ 20, 6593.5(a)(1); *Appeal of Micelle Laboratories, Inc.,* 2020-OTA-290P.) Such an error or delay shall be deemed to have occurred only if no significant aspect of the error or delay is attributable to an act of, or failure to act by, the taxpayer. (R&TC, § 6593.5(b); *Appeal of Micelle Laboratories, Inc., supra*.) Further, OTA will not generally second-guess the standard timeframes determined by CDTFA for purposes of granting discretionary relief, and will instead defer to CDTFA's decision absent evidence of an abuse of discretion. (*Appeal of Micelle Laboratories, Inc., supra*.) Any person requesting interest relief must include a statement under penalty of perjury setting forth the facts on which the request is based. (R&TC, § 6593.5(c); *Appeal of Micelle Laboratories, Inc., supra*.)

After appellant requested relief of interest, CDTFA performed an analysis of appellant's case and the specific amounts of time spent during the audit, settlement, and appeals processes.

[3] R&TC section 6593.5 states "board," however, on and after January 1, 2018, the term "board," with respect to an appeal, means the OTA. (R&TC, § 20(b).)

CDTFA found that there was no unreasonable delay in the audit examination process, but concluded that there were unreasonable delays of six months in the settlement process and seven months in the appeals process. However, CDTFA further contends that it cannot recommend interest relief absent the requisite statement. Therefore, CDTFA recommends that relief of interest for the thirteen-month period from February 6, 2018, through February 28, 2019, be granted, provided appellant submits the requisite statement.

Appellant has not asserted that there were any additional unreasonable delays by CDTFA staff, nor has appellant provided any evidence of an abuse of discretion by CDTFA. Thus, we conclude that per CDTFA's conditional concession, interest should be relieved for the period February 6, 2018, through February 28, 2019, provided appellant submits to CDTFA a statement signed under penalty of perjury setting forth the facts on which the request is based as required by R&TC section 6593.5(c) within 60 days of the date this decision is issued. (See also *Appeal of Micelle Laboratories, Inc., supra*.) No additional relief of interest is warranted.[4]

[4] We note that even were we to find that appellant was entitled to additional interest relief, we would be unable to grant it as appellant has failed to provide the required statement signed under penalty of perjury setting forth any facts on which her request is based.

HOLDINGS

1. No reduction to the amount of unreported taxable sales is warranted.
2. No increase to the deduction for unclaimed costs of tax-paid purchases resold prior to use is warranted.
3. Interest should be relieved for the period February 6, 2018, through February 28, 2019, on the condition that appellant submits the requisite statement to CDTFA within 60 days of the date this decision is issued, but no additional relief of interest is warranted.

DISPOSITION

Relieve interest for the period February 6, 2018, through February 28, 2019, as conditionally conceded by CDTFA, provided appellant submits the requisite statement to CDTFA within the specified timeframe, and otherwise, sustain CDTFA's decision to deny the petition.

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Natasha Ralston
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Natasha Ralston
Administrative Law Judge

We concur:

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Keith T. Long
Administrative Law Judge

DocuSigned by:
Huy "Mike" Le
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Huy "Mike" Le
Administrative Law Judge

Date Issued: 4/16/2021